89-191

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MELVIN TAYLOR, PUBLIC CITIZEN, INC., ARTHUR L. FOX II, ALAN B. MORRISON, AND PAUL ALAN LEVY
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD and, RYDER TRUCK LINES, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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August 1989

QUESTION PRESENTED*

May a court of appeals summarily deny, without any explanation, an application for attorney fees by a prevailing party under the Equal Access to Justice Act, where a similar ruling by a district court would be summarily reversed and remanded by a court of appeals for an explanation in order to make informed appellate review possible?

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* Petitioner Melvin Taylor and respondents National Labor Relations Board ("NLRB") and Ryder Truck Lines were the parties to the proceeding below. The remaining petitioners are the attorneys who represented petitioner Taylor below, as well as the public interest organization which employs the attorneys; they would have been the beneficiaries of the fee award whose denial is the sole issue in this Court. Respondent Ryder Truck Lines, Inc., was an intervenor in the lower court, and was the respondent in the underlying proceeding before the NLRB.

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STATUTES AND CONSTITUTIONAL PROVISION

IN THE

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MELVIN TAYLOR, PUBLIC CITIZEN, INC.,
ARTHUR L. FOX II, ALAN B. MORRISON,
AND PAUL ALAN LEVY
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD and,
RYDER TRUCK LINES, INC.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Melvin Taylor, Public Citizen, Inc., Arthur L. Fox II, Alan B. Morrison, and Paul Alan Levy petition the Court to issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit, to review the decision in this case.

OPINIONS BELOW

The decision of the court of appeals below was unreported, and is set forth at page 1a of the appendix to this petition (App. 1a). The decision of the court of appeals that denied a petition for rehearing that was filed in order to obtain an explanation of the decision at App. 1a, is also unreported, and is set forth at App. 2a. Four other unreported orders of the court of appeals on the issue of fees are set forth at App. 3a-6a.

JURISDICTION

The court of appeals did not issue a judgment embodying its decision on the attorney fee issue separate and apart from its March 31, 1989 order denying the application for attorney fees. Petitioners' petition for rehearing was denied on May 5, 1989. On June 26, 1989, Justice Kennedy granted a motion for an extension of time to file this petition, in the event that such extension were needed, until August 3, 1989. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Equal Access to Justice Act, 28 U.S.C. § 2412, provides in pertinent part:

> (d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses ... incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

The Due Process Clause of the Fifth Amendment provides, in pertinent part:

> No person ... shall ... be deprived of life, liberty, or property without due process of law ...

STATEMENT

This case began when respondent Ryder Truck Lines fired petitioner Melvin Taylor. The discharge was upheld by a Teamster joint grievance panel, but petitioner Taylor filed a charge with the National Labor Relations Board ("NLRB"), alleging that he had been fired for the exercise of his rights under the National Labor Relations Act. The NLRB's General Counsel filed an unfair labor practice ("ULP") complaint which was upheld by an Administrative Law Judge, but the NLRB dismissed the complaint because it chose to "defer" to the decision of the joint grievance panel. 273 NLRB 713 (1985).

Petitioner Taylor then sought review of the Board's order in the United States Court of Appeals for the Eleventh Circuit. Taylor's case was handled by petitioners Arthur L. Fox II, Paul Alan Levy, and Alan B. Morrison, who are attorneys on the staff of petitioner Public Citizen, Inc. Those attorneys were simultaneously litigating several cases challenging the Board's deferral standard, which was adopted in *Olin Corporation*, 268 NLRB 573 (1984), and under which the Board refused to consider ULP charges on behalf of workers who had lost their contractual claims in arbitration. In two cases, the Board's application of the *Olin* standard was overturned and remanded to the Board for a reasoned explanation of its decision.[1] In this case, the court of appeals held that the Board's *Olin* standard for "deferral" actually represented an abdication of its statutory duty to decide ULP cases and that it was contrary to law. *Taylor v. NLRB*, 786 F.2d 1516 (11th Cir. 1986).

Accordingly, the court of appeals reversed the NLRB's dismissal of petitioner Taylor's case, and remanded to the Board with directions to consider the merits of the ULP charge. When

[1] *Harberson v. NLRB*, 810 F.2d 1516 (10th Cir. 1987); *Darr v. NLRB*, 801 F.2d 1404 (D.C. Cir. 1986).

the NLRB did consider the merits, it concluded that Taylor had been fired unlawfully, and it ordered that he be reinstated with back pay. 287 NLRB No. 82 (1987). Ryder refused to comply with the Board's order, which was subsequently enforced by an unpublished order of the court of appeals. No. 88-7193 (December 15, 1988).

After the court of appeals' initial ruling remanding Taylor's case to the Board, petitioners applied for an award of attorney fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A), pursuant to which a party meeting certain financial standards (which Taylor uncontestedly did) who prevails against the United States is entitled to attorney fees unless the United States bears the burden of establishing either that its position was substantially justified or that special circumstances exist. *Ashburn v. United States*, 740 F.2d 843, 850 (11th Cir. 1984). After obtaining an extension of time to respond to the application on the ground that it "presents several complex legal issues," NLRB Motion of October 2, 1986 at 2 § 3, the NLRB opposed an award of fees with a twenty-eight page brief raising a number of defenses, including that: (1) Taylor was not yet a prevailing party because, although he had secured a "procedural victory" by overcoming the deferral hurdle, he had not yet succeeded on the merits of his ULP claim; (2) the NLRB's position was substantially justified; and (3) Taylor's fee claim was excessive. Five days after the Board filed its opposition, and before petitioners could submit their reply, the court of appeals summarily denied the application without explanation. App. 3a. Petitioners sought reconsideration or at least an explanation of the reasons for denial, pointing out that if the reason for denial was that the petition was premature, petitioners would then know that they were entitled to refile. That petition was also summarily denied without explanation. App. 4a.

After the NLRB granted Taylor relief on the merits, thus clearly making him the prevailing party, petitioners again ap-

plied for a fee award, but only for the time spent on the initial petition for review in the Eleventh Circuit. They filed their application at that time because, although they recognized that Ryder might seek review of the Board's new order, there was no time limit for seeking such review, and they were concerned about the thirty-day time limit for filing EAJA applications in 28 U.S.C. § 2412(d)(1)(B), which many courts have held to be jurisdictional. *Action on Smoking & Health v. CAB*, 724 F.2d 211, 225 (D.C. Cir. 1984). The NLRB moved to dismiss the application on the ground that the order denying the previous fee application was *res judicata*. That motion was denied without explanation, App. 5a, and the NLRB then filed a thirty-one page response to the fee application. This response raised a number of defenses, including that (1) the application was still premature because Taylor had not yet prevailed on the merits, inasmuch as the company had by then petitioned to review the order granting Taylor relief; (2) the NLRB's position was substantially justified; and (3) the requested fee was excessive. The application was denied with the following handwritten explanation: "Denied as premature." App. 6a.

After the court of appeals enforced the NLRB's order, petitioners filed their fee application a third time. The NLRB's thirty-one page opposition brief included the following defenses: (1) the NLRB's position was substantially justified; (2) a prevailing charging party is never entitled to fees under EAJA; and (3) the requested fee was excessive. Once again, the court of appeals denied the application summarily and without explanation. App. 1a. Petitioners then filed a petition for rehearing, which pointed out that if a district court had denied fees without explanation, as the court of appeals had done, settled Eleventh Circuit law would have required summary reversal for a reasoned explanation, and that in these circumstances, the refusal of the court of appeals to provide an explanation violated the Due Process Clause. The petition for rehearing was denied, and, as

with each of the court's other rulings on the fee application, there was no explanation. App. 2a.

REASON FOR GRANTING THE WRIT

The Denial of Attorney Fees Without Any Explanation Is Contrary to the Decisions of Most Courts of Appeals and of This Court, and Presents an Important Question of Law Concerning Practice in Deciding Fee Applications Under the EAJA.

If a district court ruled on an application for attorney fees in the manner that the court below did, most courts of appeals, including the Eleventh Circuit, would summarily reverse and remand to the district court for an explanation of the reasons why the district court acted in the manner that it did. The cases are legion that treat the refusal to state reasons for denying fees as a plain abuse of discretion which, standing alone, warrants a remand for a statement of reasons. *E.g., Sargeant v. Sharp*, 579 F.2d 645, 647 (1st Cir. 1978); *Maglione v. Briggs*, 748 F.2d 116, 118 (2d Cir. 1984); *Lieb v. Topstone Indus.*, 788 F.2d 151, 154 (3d Cir. 1986); *Iron Workers Local 272 v. Bowen*, 624 F.2d 1255, 1266 (5th Cir. 1980); *Murphy v. Kolovitz*, 635 F.2d 662, 663-664 (7th Cir. 1981); *Szabo Food Serv. v. Canteen Corp.*, 823 F.2d 1073, 1084 (7th Cir. 1987); *Hummell v. S.E. Rykoff & Co.*, 634 F.2d 446, 452 (9th Cir. 1980); *Hayes v. Heckler*, 785 F.2d 1455, 1457 (9th Cir. 1986); *Rothenberg v. Security Mgmt. Co.*, 736 F.2d 1470, 1472-1473 (11th Cir. 1984). *See also Taragan v. Eli Lilly & Co.*, 838 F.2d 1337, 1339 (D.C. Cir. 1988); *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 479 (5th Cir. 1980) (concurring opinion *en banc*), *aff'd*, 452 U.S. 89 (1981).

Surely, the courts of appeals must meet similar standards when they make the initial ruling on a fee request. Otherwise the parties cannot be sure whether there is any basis for seeking

rehearing *en banc* or a writ of certiorari, because they cannot be sure what rules of law the court has applied in deciding that fees should not be awarded. Nor, indeed, can the parties know in what circumstances they should apply for fees (or settle fee applications) in the future. Thus, although the failure to provide an explanation here may have been based on the belief that the court was conserving judicial resources, one function that explanations perform is to assist parties in resolving future disputes (in this case, about fees) without the need for judicial intervention. That function is thwarted when no explanation is provided, and the result is to increase the amount of litigation rather than decrease it.

For example, if the court below had given as its reason for denying fees that, as argued by the NLRB, charging parties should never be awarded fees against the NLRB, that rationale would eliminate a whole class of potential fee applications for the courts to consider. It might also, of course, significantly affect the incentives for attorneys who are considering whether or not to represent charging parties in petitions for review of NLRB decisions, and it might command the attention of Congress. But there is no reason for anyone to consider that issue unless it is clear that the court below relied on it as a reason for denying fees.

If, on the other hand, the reason for the denial was that the government's position was considered to have been substantially justified, the parties should at least be told which "position" was considered, what standard of law was applied to determine whether there was substantial justification, and how the government's position was substantially justified in this case. Again, explanations help institutional litigants, both the government and administrative practitioners such as undersigned counsel, in assessing the prospects for fee applications and thus in deciding whether or not to seek them, in the case of petitioners, and to stipulate to them, in the case of respondents, in comparable

Eleventh Circuit cases in the future.

In addition to being unhelpful to a possible reviewing court and inefficient as a matter of judicial administration, the denial of fees without any explanation is a patent denial of due process. *E.g., Goldberg v. Kelly*, 397 U.S. 254, 271 (1970); *Morrissey v. Brewer*, 408 U.S. 471, 487 (1972); *Wolff v. McDonnell*, 425 U.S. 539, 565 (1974). We do not suggest that either the statute or the Due Process Clause necessarily requires a court to provide a statement of reasons whenever it is requested to take any action by any person who chooses to file a motion. Here, however, the statute provides that a court "shall" award fees to a prevailing party unless it "finds" that one of two grounds for denying fees is present. 28 U.S.C. § 2412(d)(1)(A). The court below did not make any such finding, not to speak of providing an explanation for its decision. Petitioners' presumptive entitlement to fees, given Taylor's status as a financially qualifying party who has undisputably prevailed, is a property interest that may not be denied, consistent with due process or with the statute, without a statement of reasons.

CONCLUSION

The petition for a writ of certiorari should be granted. Because it seems unlikely that the issues would be illuminated by full briefing and oral argument, the Court should consider a summary reversal, remanding the case to the court of appeals for an explanation of its decision.

Respectfully submitted,

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August, 1989

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
F I L E D
MAR 5 1989
MIGUEL J. CORTEZ
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 85-3220

MELVIN D. TAYLOR,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

RYDER TRUCK LINES, INC.,
Intervenor.

Application for Enforcement of an Order of the
National Labor Relations Board

Before VANCE, Circuit Judge, HENDERSON , Senior Circuit Judge, and LYNNE*, Senior District Judge.

BY THE COURT:

The petitioner's application for an award of attorney fees is Denied.

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*Hon Seybourn H. Lynne, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
MAY 5 1989
MIGUEL J. CORTEZ
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 85-3220

MELVIN D. TAYLOR,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

RYDER TRUCK LINES, INC.,
Intervenor.

Application for Enforcement of an Order of the
National Labor Relations Board

Before VANCE, Circuit Judge, HENDERSON , Senior Circuit Judge, and LYNNE*, Senior District Judge.

BY THE COURT:

Petitioner's petition for rehearing, construed as a motion for reconsideration of this court's March 31, 1989 order denying attorney's fees, is Denied.

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*Hon Seybourn H. Lynne, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
F I L E D
DEC 8 1986
MIGUEL J. CORTEZ
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 85-3220

MELVIN D. TAYLOR,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

RYDER TRUCK LINES, INC.,
Intervenor.

— — — — — — —

Application for Enforcement of an Order of the
National Labor Relations Board

— — — — — — —

Before VANCE, Circuit Judge, HENDERSON , Senior Circuit Judge, and LYNNE*, Senior District Judge.

BY THE COURT:

Petitioner's motion for reconsideration of the Court's November 10, 1986, order denying an award of attorney's fees is Denied.

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*Hon Seybourn H. Lynne, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
F I L E D
NOV 10 1986
MIGUEL J. CORTEZ
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 85-3220

MELVIN D. TAYLOR,
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Intervenor.

— — — — — — — —

Application for Enforcement of an Order of the
National Labor Relations Board

— — — — — — — —

Before VANCE, Circuit Judge, HENDERSON , Senior Circuit Judge, and LYNNE*, Senior District Judge.

BY THE COURT:

Petitioner's application for an award of attorney fees is Denied.

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*Hon Seybourn H. Lynne, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
FEB 10 1988
MIGUEL J. CORTEZ
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 85-3220

MELVIN D. TAYLOR,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

RYDER TRUCK LINES, INC.,
Intervenor.

Application for Enforcement of an Order of the
National Labor Relations Board

ORDER:

The motion of the National Labor Relations Board to dismiss the petitioner's application of an award of attorney's fees is ~~Dismissed~~ Denied.

Further, the motion of the National Labor Relations Board for an extension of time, to and including 14 days from the Court's ruling on its motion to dismiss, in which to respond to the application for an award of attorney's fees is GRANTED.

s/ Robert D. Vance
UNITED STATES CIRCUIT JUDGE

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
F I L E D
MAR 15 1988
MIGUEL J. CORTEZ
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 85-3220

MELVIN D. TAYLOR,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
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and

RYDER TRUCK LINES, INC.,
Intervenor.

Application for Enforcement of an Order of the
National Labor Relations Board

Before VANCE, Circuit Judge, HENDERSON , Senior Circuit Judge, and LYNNE*, Senior District Judge.

BY THE COURT:

Petitioner's application for an award of attorney's fees is Denied as premature.

No. 89-191

In the Supreme Court of the United States

OCTOBER TERM, 1989

MELVIN TAYLOR, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals was required to issue a written opinion when it denied a request for an award of fees and expenses under the Equal Access to Justice Act, 28 U.S.C. 2412 (1982 & Supp. V 1987).

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v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals on the merits is reported at 786 F.2d 1516. The order of the court of appeals denying an award of attorney fees (Pet. App. 1a) is unreported.

JURISDICTION

The order of the court of appeals denying the motion for attorney fees was entered on March 31, 1989

(Pet. App. 2a). On June 26, 1989, Justice Kennedy granted an extension of time to and including August 3, 1989, within which to petition for a writ of certiorari, and the petition was filed on that date.

STATEMENT

1. Petitioner Melvin Taylor was discharged by respondent Ryder Truck Lines for refusing to drive a truck that he believed to be unsafe. An arbitral panel upheld Taylor's discharge under the collective bargaining agreement. The National Labor Relations Board, applying its decision in *Olin Corp.*, 268 N.L.R.B. 573 (1984) deferred to the arbitral decision and dismissed a complaint brought by the General Counsel alleging that the discharge violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1). 273 N.L.R.B. 713 (1985).

On a petition for review, the court of appeals disapproved the Board's *Olin* standard for deferral, held that the Board had improperly deferred to the arbitral decision and remanded for a determination of the merits. *Taylor* v. *NLRB*, 786 F.2d 1516 (11th Cir. 1986). On remand, the Board determined that Taylor's discharge violated Section 8(a)(1) of the Act and ordered that he be reinstated with back pay. *Ryder Truck Lines, Inc.*, 1987-1988 NLRB Dec. (CCH) ¶ 19,269 (Dec. 16, 1987). Ryder refused to comply with the order and, on the Board's application for enforcement, the court of appeals enforced the Board's order. *NLRB* v. *Ryder Truck Lines*, 863 F.2d 889 (11th Cir. 1988) (Table).

2. On September 30, 1986, after the court of appeals issued its remand order to the Board but before the Board had reconsidered the case, Taylor filed a petition for an award of fees and expenses under the

Equal Access to Justice Act (EAJA), 28 U.S.C. 2412 (1982 & Supp. V 1987).[1] The Board filed an opposition to the application, arguing that Taylor was not at that time a prevailing party, and that in any event he was not entitled to fees because the Board's position in the litigation had been substantially justified. On November 10, 1986, the court of appeals issued an order stating that "Petitioner's application for an award of attorney fees is Denied." Pet. App. 4a. Reconsideration was denied on December 8, 1986. *Id.* at 3a.

On January 14, 1988, after the issuance of the Board's decision on remand, Taylor filed a renewed application for an award of attorney fees and costs under EAJA. The Board moved for a stay of the consideration of the EAJA application pending resolution of the enforcement proceeding against Ryder then pending in the court of appeals, but on March 15, 1988, the court of appeals instead denied the renewed application for an award of fees as premature. Pet. App. 6a.

3. On December 21, 1988, Taylor filed a third application for an award of EAJA fees and expenses. The Board filed an opposition, arguing that the position of the Board had been substantially justified and that a charging party before the Board, such as Taylor, is not entitled to an EAJA award. The court of appeals denied Taylor's application without opin-

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[1] EAJA, 28 U.S.C. 2412(d)(1)(A) (1982 & Supp. V 1987), provides for a court award of attorney fees and other expenses to certain classes of private parties prevailing in any civil action brought by or against the United States, unless the court finds that the position of the government was "substantially justified," or that "special circumstances make an award unjust."

ion. Pet. App. 1a. Taylor's petition for rehearing was also denied without opinion. *Id.* at 2a.

ARGUMENT

1. It has long been the accepted practice of the appellate courts, including this Court, to dispense with the writing of opinions in certain cases. See Shaforth, *Survey of the United States Courts of Appeals*, 42 F.R.D. 247, 271 (table of number of dispositions per circuit without opinion in 1966); Fed. R. App. P. 36 (recognizing practice). The courts of appeals "have wide latitude in their decisions of whether or how to write opinions." *Taylor* v. *McKeithen*, 407 U.S. 191, 194 n.4 (1972). This latitude is necessary, because the determination of whether the preparation of an opinion to explain the basis for a particular order is a wise expenditure of limited judicial resources depends so heavily on factors peculiarly within the knowledge of the court involved, and any requirement of an explanation of the basis for those determinations would quickly consume the very judicial resources to be conserved.[2]

There is, in any event, no reason to question the decision of the court below that the denial of attorney fees and expenses in this case did not merit an

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[2] The Eleventh Circuit, like many other circuits, has adopted a local Rule to define the circumstances in which the need to conserve scarce judicial resources outweighs the benefits of a written opinion on the merits of an appeal. See 11th Cir. R. 36-1; 5th Cir. R. 47.6; 2d Cir. R. 0.23 (noting that "[t]he demands of an expanding caseload require the court to be ever conscious of the need to utilize judicial time effectively"); 9th Cir. R. 36-1, R. 36-2; D.C. Cir. R. 14(c).

explanation.[3] The local Rules defining the circumstances in which decisions on the merits need not be accompanied by written opinions typically refer to circumstances in which an opinion would have no precedential value (11th Cir. R. 36-1; 5th Cir. R. 47.6; 2d Cir. R. 0.23). An opinion explaining this collateral order, which evidently turned on the conclusion that the agency's position was substantially justified on the particular facts of this case, would obviously have no precedential value.[4] Cf. *Taylor* v. *McKeithen*, 407 U.S. at 194-195 n.4 (remanding for the preparation of an appellate opinion in a legislative reapportionment case, because the Court was unwilling "to impute to the Court of Appeals reasoning that would raise a substantial federal question when it is plausible that its actual ground of decision was of more limited importance").

Noting that district courts acting on EAJA fee applications must explain the reasons for their decisions, petitioners contend (Pet. 6-7) that when courts of appeals "make the initial ruling on a fee request" they must be subject to the same requirement so that

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[3] The courts of appeals routinely have denied EAJA applications without written opinions. *See, e.g., G.W. Galloway Co.* v. *NLRB*, No. 86-1540 (D.C. Cir. Mar. 29, 1989); *Thomas R. Harberson* v. *NLRB*, No. 84-2488 (10th Cir. Mar. 15, 1988).

[4] Petitioners suggest that the order might have been based on the court's acceptance of the agency's alternative argument that a charging party could not be a "prevailing party" entitled to EAJA fees (see 28 U.S.C. 2412(d)(1)(A)). In light of 11th Cir. R. 36-1, it is highly unlikely that the court would have adopted that rationale, of obvious precedential importance, without writing an opinion explaining its basis for doing so. In any event, the order clearly stands for no such proposition.

the parties will have a basis for seeking rehearing en banc or a writ of certiorari. This argument by analogy overlooks the fundamental distinction between the losing party's right to appellate review of a district court determination and the discretionary nature of en banc and certiorari review. Because the court of appeals must review a district court's fee ruling at the request of the losing party whether or not that ruling involves issues that have any importance beyond the particular case, it is entitled to a record that is sufficient to permit informed review. But review of appellate court rulings is entirely discretionary. Unless there are issues of importance beyond the particular case, there is no legitimate basis for seeking further review.

Of course, if there are such issues, the lack of a written opinion does not preclude the parties from seeking rehearing or filing a petition for a writ of certiorari. For example, in *Northcross* v. *Board of Education*, 412 U.S. 427 (1973), the court of appeals, without opinion, denied costs and fees to the prevailing party in a school desegregation suit. The prevailing party sought certiorari, contending that the wrong standard had been applied in making that determination. The Court vacated and remanded the case because it was unable to determine whether the correct standard had been applied. *Id.* at 428-429. Here, petitioners do not challenge the denial of the EAJA award on the merits.[5] Had they done so, the

[5] The burden of demonstrating substantial justification or special circumstances in an EAJA case is on the government. *Spencer* v. *NLRB*, 712 F.2d 539, 557 (D.C. Cir. 1983), cert. denied, 466 U.S. 936 (1984). In its brief to the court of appeals the Board explained why it believed its *Olin* deferral position to be substantially justified and why it believed that,

Court, if it were concerned about the exact nature of the grounds for the decision below, could have followed the course it took in *Northcross*.

2. Petitioners' contention (Pet. 8) that the denial of a fee award without written opinion was a denial of due process is equally meritless. In the first place, petitioners' assertion (Pet. 8) that they have a constitutionally protectible property interest in their expectation of an award of attorney fees is unpersuasive. Under the principles established in *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972), petitioners have no more than "an abstract * * * desire [or] a unilateral expectation" of an award of EAJA fees, not a statutorily defined entitlement to them.[6] Although petitioners correctly observe that EAJA provides that the court "shall" award attorney fees to an eligible prevailing party unless it finds that the position of the United States was substantially justified or special circumstances make an award unjust, those two exceptions make the decision concerning whether to award fees highly discretionary. Cf. *Greenholtz* v. *Nebraska Penal Inmates*, 442 U.S. 1, 9-11 (1979). Indeed, unless one were to assume that Congress concluded that the government routinely conducts litigation in which its position is not substantially justi-

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in any event, Taylor, as a charging party on whose behalf the General Counsel ultimately litigated the case to a successful conclusion, was not entitled to a fee award. Petitioners were not deprived of an opportunity to challenge either of those positions because of the lack of a written opinion. However, they chose not to do so.

[6] As this Court noted in *Greenholtz* v. *Nebraska Penal Inmates*, 442 U.S. 1, 10 (1979), " 'there is a human difference between losing what one has and not getting what one wants' " (citation omitted).

fied, the award of EAJA fees was intended to be the exception, not the rule.

Even assuming that petitioners' expectation of a fee award is entitled to some measure of constitutional protection, they have clearly received all the process that is due. As this Court has observed (*Greenholtz* v. *Nebraska Penal Inmates*, 442 U.S. at 12-13, citations omitted):

> It is axiomatic that due process "is flexible and calls for such procedural protections as the particular situation demands." The function of legal process, as that concept is embodied in the Constitution, and in the realm of factfinding, is to minimize the risk of erroneous decisions. Because of the broad spectrum of concerns to which the term must apply, flexibility is necessary to gear the process to the particular need; the quantum and quality of the process due in a particular situation depend upon the need to serve the purpose of minimizing the risk of error.

See *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976).

Petitioners have received the full panoply of procedures attendant on judicial review of their request for an award of attorney fees, with the sole exception of a written opinion explaining the precise basis for the denial. They do not contend that a requirement of a written opinion would sufficiently increase the accuracy of the fee determination to justify the expenditure of judicial resources it would necessitate, nor could they reasonably make such a claim. Accordingly, due process does not require that the court of appeals memorialize the basis for its decision to deny an EAJA fee in a written opinion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1989

☆ U. S. GOVERNMENT PRINTING OFFICE: 1989 241699 00502

No. 89-191

IN THE

Supreme Court of the United States

OCTOBER TERM 1989

MELVIN TAYLOR, PUBLIC CITIZEN, INC., ARTHUR L. FOX II, ALAN B. MORRISON, AND PAUL ALAN LEVY,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD and RYDER TRUCK LINES, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF IN SUPPORT OF CERTIORARI

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September 1989

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In defending the refusal of the court below to provide any explanation whatsoever for the denial of petitioners' application for attorney fees, respondent National Labor Relations Board ("Board") cites the local rules of several circuits. Opp. 4.-5. Many of those rules, however, simply provide for the decision of cases without any published opinion or written memoranda, although plainly anticipating some explanation of the decision in either an unpublished memorandum or a bench opinion that would be transcribed and available to the parties. *E.g.*, D.C. Circuit Rule 14(c); Second Circuit Rules § 0.23; Ninth Circuit Rule 36-1. Whatever the propriety of the widespread practice of deciding cases and refusing to accord precedential significance to the explanation for such decisions, that is very different from refusing to explain the decision at all.

Respondent assumes that the lower court did not deny fees based on its novel argument that a charging party is never a prevailing

party because that would have had obvious precedential significance. Opp. 5 n.4. But a decision that the government's position here was "substantially justified" would also be precedentially significant in light of the conclusions of the court of appeals on the merits that the Board's new standard for deferral to arbitration "cannot pass muster," *Taylor v. NLRB*, 786 F.2d 1516, 1520 (11th Cir. 1989), "does not protect sufficiently an employee's rights granted by the National Labor Relations Act," *id.* at 1521, "gives away too much of the Board's responsibility under the NLRA," *id.* at 1522, "cannot be reconciled with the need to protect statutory rights," *id.*, "appears on its face to represent an abdication of Board responsibility" under the Act, *id.*, and is "unmindful of the Board's statutory responsibility and of individual rights." *Id.* These statements reflect the forceful ruling of the court below that the Board's decision had plainly been contrary to law, thus making it hard to imagine how the Board's position could have been substantially justified. Although there may be some explanation for denying fees in this case on the ground that the Board was "substantially justified," we have difficulty imagining it.[1]

Respondent also faults petitioners for "cho[osing]" not to seek review in this Court on the merits of the denial of fees. But what would the Question Presented be? "Did the Court of Appeals err in denying fees because . . . [reason to be filled in later]"? Petitioners cannot show that the decision below is "in conflict with the decision of another court of appeals," Supreme Court Rule 17.1(a), or that the court below "has decided an important question of federal law," Supreme Court Rule 17.1(c), when petitioners have no idea what the basis for the decision below was. Only if the court of appeals first explains its decision, will petitioners then be able to evaluate its reasons and determine whether the case warrants review

[1]Perhaps the court below thought that, although the Board's decision was contrary to law, the Board was substantially justified in arguing the contrary positon in the court of appeals. But that unspoken rationale would conflict with the 1985 amendments to the Equal Access Access to Justice Act, 28 U.S.C. § 2412(d)(2)(D), according to which the "position of the United States" that must be substantially justified includes the action or failure to act on which the petition for review is based, as well as the position in litigation.

under the standards of Rule 17. Respondent may prefer a one-step procedure, whereby petitioners have to speculate about the reasons for the decision below in their request for review in this Court, but that approach places a far greater burden on this Court than a rule that requires a reasoned explanation whenever there is a serious request for fees under a statute that presumes that fees should be awarded. Until the reasons are set forth, a petition on the merits would be an inappropriate imposition on this Court's docket.

As Judge Tamm explained in *Davis v. Clark*, 404 F.2d 1356, 1358 (D.C. Cir. 1968), the requirement of providing a simple explanation for a decision "is not onerous if the matter was dealt with in a conscientious manner in passing on the merits." The fact that fee decisions of the courts of appeals are rarely reviewed by this Court only increases the need for those courts to prepare explanations for their decisions if for no other reason than that the discipline of having to set forth reasons decreases the likelihood of erroneous results and of disparate treatment of similar cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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